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THE EXPANSION OF CHARITABLE CHOICE, THE FAITH BASED INITIATIVE, AND THE SUPREME COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

STEVEN FITZGERALD

During the 2000 Presidential Campaign, both Vice President Al Gore and Texas Governor George W. Bush agreed that faith-based organizations should play a greater role in government-sponsored social welfare programs¹ and the Bush Administration made it a cornerstone of its domestic policy.² While the issue may have come into vogue during the election, the Bush Administration's "faith-based initiative"³ was born in the Welfare Reform Act of 1996.⁴ This Act created Charitable

¹ Albert R. Hunt, *Faith-Based Efforts: The Promise and Limitations*, WALL ST. J., Aug. 12, 1999 at A23 ("Both Vice President Al Gore and Texas Gov. George W. Bush have espoused greater reliance on church and community [based] organizations to provide social services for the poor and infirm.").

² See *Rallying the Armies of Compassion* at <http://www.whitehouse.gov/news/reports/text/faithbased.html> (last checked Sept. 3, 2003) (explaining why faith-based organizations are often better suited to address social welfare problems and how the administration intends to funnel resources to them); see also John J. DiIulio Jr., *Know Us by Our Works*, WALL ST. J. Feb. 14, 2001 at A22 (the first head of the newly created Office of Faith-Based Initiatives outlining some of the administration's goals); Maria Newman, *Bush Visit Sets Off Church-State Debate*, N.Y. TIMES, Mar. 15, 2001 at B5 (reporting on President Bush's visit to Episcopal Church administering the "Youth Entertainment Academy," a group that received State funds after passage of Charitable choice. Bush pointed to the program as a model for his faith-based initiative); David E. Sanger, *Bush Asks Mayors to Lobby For Faith-Based Social Aid*, N.Y. TIMES, June 26, 2001 at A17 (reporting how Bush petitioned mayors to lobby Congress in support of the Faith Based legislation while assuring separation of church and state would remain).

³ See *Mr. Bush's 'Faith Based' Agenda*, N.Y. TIMES, July 8, 2001 at 10 (referring to the administration's policy as "the 'faith based' initiative.").

⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996,

Choice,⁵ a provision giving faith-based organizations a right to compete for public funding of their social welfare programs equal to the funding enjoyed by public agencies and other non-religiously affiliated organizations.⁶ Before Charitable Choice, distinctly separate organizations set up by religious institutions, like Catholic Charities, were eligible for and received government funds subsidizing their social welfare services.⁷ Charitable Choice is unique because it does not require a recipient to institutionally separate its social services from its religious organization as long as federal funds are not used to directly advance religion.⁸ Supporters of the provision point out that the religious nature of these providers often makes them more effective than traditional providers.⁹ Opponents argue that the provision is unconstitutional,¹⁰ and some fear that the program is merely an attempt to shift responsibility away from the government and onto religious groups without a corresponding transfer of funds.¹¹

Pub. L. No. 104-193, 110 Stat. 2105 (codified within various sections of 42 U.S.C. § 1305).

⁵ See 42 U.S.C. § 604a (2000); Symposium, *Living With Privatization: At Work and In the Community*, 28 FORDHAM URB. L.J. 1397, 1412 (2001) (noting that charitable choice was originally a provision within the Welfare Reform Act sponsored by then Senator John Ashcroft) (hereinafter *Living With Privatization*).

⁶ See 42 U.S.C. 604a(c) ("[R]eligious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement . . . neither the Federal Government nor a State . . . shall discriminate against an organization . . . on the basis that that organization has a religious character."); *Living With Privatization*, *supra* note 5 at 1412 (noting that after passage of this provision religiously affiliated social service providers could "compete . . . on equal footing with public agencies, nonprofit organizations, and for-profit corporations.").

⁷ See *Bradfield v. Roberts*, 175 U.S. 291, 297 (1899) (holding that a hospital administered by Catholic Church was not a religious body and that federal aid was appropriate); Hunt, *supra* note 1 (reporting that two thirds of Catholic Charities' funding comes from government sources).

⁸ *Living With Privatization*, *supra* note 5, at 1412 ("[F]aith based initiatives can be explicitly religious, as long as . . . public money is not directly supporting the religious part of their services.").

⁹ See *id.* at 1413 ("Underlying this is the belief that the faith factor of religious social services is what makes them more successful.").

¹⁰ *Mr. Bush's 'Faith Based' Agenda*, *supra* note 3 (expressing concern that Charitable Choice will blur the lines between secular and impermissible religious government funding).

¹¹ See Elizabeth Becker, *An American Cardinal Who Works to Help the World*, N.Y. TIMES, Mar. 5, 2001 at A11 ("Cardinal McCarrick said he would have told Mr. Bush of his fear that the Government would get out of needed social assistance and hand it over to religious groups."); Hunt, *supra* note 1 ("[T]hey stress, faith-based

Neither the original incarnation of Charitable Choice nor the President's expansion efforts have resulted in a great influx of funding to faith-based social service providers.¹² Rather, they have resulted in an outcry¹³ from those who believe that even the limited form of Charitable Choice already in place is a violation of the Establishment Clause¹⁴ and that President Bush's expanded version will only make matters worse. Expansion of Charitable Choice, contained in The Community Solutions Act of 2001,¹⁵ passed the U.S. House of Representatives in July 2001 and is considered a limited version of the Bush Administration's proposal.¹⁶ The Senate version of the bill, entitled Charity Aid, Recovery, and Empowerment Act of 2002 (CARE Act), was introduced into committee on February 8, 2002.¹⁷ At this

initiatives have to supplement government efforts, rather than substitute or replace them."); Newman, *supra* note 2 (noting that some think Republicans merely want out of social services).

¹² See Hunt, *supra* note 1 (noting that even faith based providers in Texas during President Bush's term as Governor reported no real influx of funding for these organizations after passage of Charitable Choice); Kim Cobb, *Faith Groups Wary of Bush Idea; Expense of Court Battles Could Offset Benefits of Federal Funds*, HOUST. CHRON., Feb. 11, 2001 at A22 (discussing the inherent pitfalls of federal funding).

¹³ David J. Freedman, Note, *Wielding the Ax of Neutrality: The Constitutional Status of Charitable Choice in the Wake of Mitchell v. Helms*, 35 U. RICH. L. REV. 313, 315 (2001) ("Charitable Choice violates the Establishment Clause."). See Elizabeth Becker, *Changes Open Door for Bill On Charities of Churches*, N.Y. TIMES, June 28, 2001, at A23 ("Republicans have so far failed to enlist the support of many Democrats, largely because of constitutional issues."); Mr. Bush's 'Faith Based' Agenda, *supra* note 3 ("[A]s currently drafted, the 'faith based' initiative still raises concerns about possible violations of the separation between church and state."); Newman, *supra* note 2 (quoting church members who felt the bill violated separation of church and state); Patricia Rice, *Faith-Based Programs Would Answer Prayer, Backers Say; Others Worry That Bill Would Violate Separation of Church and State; But Need For Help is Real, They Say*, ST. LOUIS POST-DISPATCH, Mar. 25, 2001, at A8 (explaining that while such a program is beneficial, it may unduly lessen the divide between church and state).

¹⁴ U.S. CONST. Amend. I ("Congress shall make no law respecting an establishment of religion.").

¹⁵ H.R. 7, 107th Cong. (2001) (referred in Senate July 19, 2001).

¹⁶ See Elizabeth Becker, *Less For Charities*, N.Y. TIMES, July 12, 2001, at A20 (noting that a scaled down version came out of committee).

¹⁷ S. 1924, 107th Congress (2002). The Senate version of the bill uses more general language than the House version. In many respects it simply reiterates the original charitable choice provision contained in 42 U.S.C. § 604(a). However, the Bush Administration has expressed approval of it. See President Bush, *Sen. Lieberman Discuss Armies of Compassion*, available at <http://www.whitehouse.gov/news/releases/2002/02> (Sept. 2, 2003).

writing, that is where it sits.¹⁸

This Note will summarize the Supreme Court's Establishment Clause jurisprudence as it pertains to the expansion of Charitable Choice and the Faith-Based Initiative and analyze its current application in the Second Circuit. It will then show that Expansion of Charitable Choice¹⁹ does not violate the Establishment Clause and the Bush administration's wider proposals could also be enacted without violence to the First Amendment. However, potential constitutional and practical dangers could arise, and this Note will suggest ways that policy makers can avoid the pitfalls by providing safeguards for religiously affiliated social service providers. Finally, this Note will look at the issue from the affiliated organization's perspective and offer some caveats.

I. THE LEMON-AGOSTINI TEST

Establishment Clause jurisprudence has undergone a tremendous shift over the last decade and polarization on the Supreme Court has made interpretation extremely difficult.²⁰ Given the political realities on the Court, if one had to summarize this area of the law in one line it would be: "It's what Justice O'Connor says it is." Perhaps this statement is an

¹⁸ This bill was doomed to languish in the Senate from the outset. See Elizabeth Becker, *Lieberman Joins Bush Bid To Push Aid-To-Charity Bill*, N.Y. TIMES, July 21, 2001, at A11 (noting that Senate Majority Leader, Tom Daschle, was unlikely to rush bill to floor because of "provisions that allow religious charities to hire only members of their faith."). The attack on September 11, 2001 has certainly aggravated this delay. The attack also has had a pronounced enlarging effect on the Federal Government. Given the Bush administration's distaste for "big government," Charitable Choice may be more important than ever. If the Federal Government could reduce its role in providing welfare services, perhaps growth in other areas of the government would seem less pronounced. However, some might argue that September eleventh has taught us that charities are not necessarily more efficient than traditional government providers.

¹⁹ Title II of The Community Solutions Act of 2001 is titled "Expansion of Charitable Choice" H.R. 7, 107th Cong. (2001).

²⁰ See *Mitchell v. Helms*, 530 U.S. 793, 804 (2000) (Justice Thomas notes in his plurality opinion that "Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle."); *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 405 (2d Cir. 2001) (noting that after a decade of polarization in this area "the governing law remains in doubt.").

oversimplification but it is how the lower courts are proceeding.²¹ This conclusion is inescapable after an analysis of the Justices' votes in these cases: Justices Rehnquist, Thomas, Kennedy, and Scalia vote together,²² favoring an almost complete departure from previous Establishment Clause jurisprudence.²³ Justices Souter, Stevens, and Ginsburg consistently join in dissent of that view.²⁴ Justice Breyer had been joining the dissenters²⁵ until recently when he joined in Justice O'Connor's concurrence in *Mitchell v. Helms*.²⁶ Therefore, Justice O'Connor holds the deciding vote.²⁷ Her narrower view is, for all practical purposes, the law in this area²⁸ and will likely continue to be until membership on the Court changes.

In *Agostini v. Felton*,²⁹ Justice O'Connor wrote for a five to four majority. The Court was asked to reconsider a decision made fifteen years earlier that resulted in a permanent injunction barring public employees from entering parochial schools³⁰ to provide remedial instruction.³¹ The Court recognized, in light of the evolution of Establishment Clause jurisprudence, the earlier decision was no longer good law.³² To bring some clarity into this area,³³ the majority "modified"³⁴ the

²¹ See *DeStefano*, 247 F.3d at 419 (stating that it would follow O'Connor's concurring opinion in *Mitchell* rather than the plurality).

²² See *Mitchell*, 530 U.S. at 801; *Rosenberger v. Rector*, 515 U.S. 819, 822 (1995).

²³ See *Mitchell*, 530 U.S. at 826 (Justice Thomas writing for the plurality, "that period is one that the Court should regret, and it is thankfully long past."); see also *id.* at 837 (O'Connor, J., concurring) ("[I]n my view, the plurality announces a rule of unprecedented breadth.").

²⁴ See *Mitchell*, 530 U.S. at 867; *Agostini v. Felton*, 521 U.S. 203, 240 (1997); *Rosenberger*, 515 U.S. at 863.

²⁵ See *Rosenberger*, 515 U.S. at 822 (joining dissent). See *Agostini*, 521 U.S. at 240 (Breyer, J., joining in part of dissent).

²⁶ See *Mitchell*, 530 U.S. at 836.

²⁷ See *DeStefano*, 247 F.3d at 418 (stating that ruling view in *Mitchell* is Justice O'Connor's view).

²⁸ See *id.* at 419 ("[W]e conclude that Justice O'Connor's opinion is narrower than the plurality's.").

²⁹ 521 U.S. 203 (1997).

³⁰ Although the central focus of this article is not aid to religiously affiliated schools, it is impossible to discuss Establishment Clause jurisprudence without reference to these cases. The religious school is also sufficiently analogous to the religiously affiliated social welfare provider.

³¹ See *Agostini*, 521 U.S. at 208-09.

³² *Id.* at 209. (holding that the earlier decision was not consistent with subsequent decisions)

³³ See *Mitchell*, 530 U.S. at 807 (Justice Thomas pointing out that *Agostini*

criteria used to determine whether government aid to a religiously affiliated organization violates the Establishment Clause.³⁵ After this, the previously applied *Lemon* test³⁶ is no longer particularly relevant.³⁷ The emerging test, referred to as the *Lemon-Agostini* test,³⁸ is now the proper starting point for an analysis of whether government funding violates the Establishment Clause.³⁹

Under the *Lemon-Agostini* test, the first step is to determine whether the statute in question has a secular purpose.⁴⁰ If it does, the next step is to determine "whether the aid has the 'effect' of advancing or inhibiting religion."⁴¹ In order to determine whether the aid has an impermissible effect, the Court looks to three criteria: (1) whether the aid results in governmental indoctrination; (2) whether recipients of aid are defined by reference to religion; and (3) whether the aid creates an excessive entanglement between the government and religion.⁴² These same criteria are considered when determining

"brought some clarity").

³⁴ *Id.*

³⁵ *Agostini*, 521 U.S. at 234.

³⁶ See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating test under which to determine whether a statute violates the Establishment Clause: (1) The statute must have a secular purpose; (2) It must not have the primary effect of advancing or inhibiting religion; (3) It must not result in excessive government entanglement with religion).

³⁷ See *Mitchell*, 530 U.S. at 808 (Justice Thomas for the Plurality, "[O]ur cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon's* entanglement inquiry as simply one criterion relevant to determining a statute's effect." (citing *Agostini*, 521 U.S. at 232-33)). But see *Simmons-Harris v. Zelman*, 234 F.3d 945, 952 (6th Cir. 2000) ("The Supreme Court has not overturned or rescinded the *Lemon* test.").

³⁸ *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 413 (2d Cir. 2001).

³⁹ See *Mitchell*, 530 U.S. at 807 (explaining that *Agostini* brought clarity prior case law); *DeStefano*, 247 F.3d at 405 (noting how the Second Circuit has continued to apply the *Lemon* test as modified by *Agostini*).

⁴⁰ *Agostini*, 521 U.S. 203, 222-23 ("[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion."). Among the cases cited for this proposition was *Bowen v. Kendrick*, 487 U.S. 589, 593 (1988) (holding that Adolescent Family Life Act was enacted for the secular purpose of reducing teen pregnancies). See also *Mitchell*, 530 U.S. at 845 (O'Connor concurring) (asking "whether the program results in governmental indoctrination or defines its recipients by reference to religion.").

⁴¹ *Agostini*, 521 U.S. at 223. See *Mitchell*, 530 U.S. 845 (O'Connor, J. concurring).

⁴² See *Agostini*, 521 U.S. at 234; see also *Mitchell*, 530 U.S. at 845 (O'Connor, J.

whether aid constitutes an impermissible endorsement of religion.⁴³

To determine whether Congress acted with a valid secular purpose, the Court generally looks to the problem the law meant to address.⁴⁴ If that purpose was not to advance or inhibit religion, it probably has a valid secular purpose.⁴⁵ The effect test is more complex.

A. Governmental Indoctrination

The first prong of the *Lemon-Agostini* test asks whether the program or law results in governmental indoctrination.⁴⁶ “[I]ndoctrinate means ‘to instruct in a body of doctrine or principles. . . . To imbue with a partisan or ideological point of view.’”⁴⁷ Any indoctrination must be attributable to the government to amount to governmental indoctrination.⁴⁸ *Agostini* noted that prior cases had held that the mere presence of a public employee in a sectarian environment was governmental indoctrination because the employee might instill religious tenets into students, either mistakenly or intentionally.⁴⁹ The cases also held that placing public

concurring).

⁴³ See *Agostini*, 521 U.S. at 235 (stating that the same considerations apply in determining whether the program can be viewed as an endorsement of religion); see also *Mitchell*, 530 U.S. at 845 (O'Connor, J. concurring) (“[T]he same criteria could be reviewed to determine whether a government-aid program constitutes an endorsement of religion.”).

⁴⁴ See *Bowen v. Kendrick*, 487 U.S. 589, 603–04 (noting that Congress passed Adolescent Family Life Act not to endorse religion but to deal with teen pregnancy. This was a valid secular purpose).

⁴⁵ See *Agostini*, 521 U.S. at 222–23 (“[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion.”). *Agostini* involved Title I of the Elementary and Secondary Education Act of 1965 which ultimately allowed public employees to provide remedial instruction to students in parochial schools. *Id.* at 208–09. The purpose of this legislation was to provide equal educational opportunity. *Id.* The Court noted that the previous disposition of the case didn’t turn on whether the program had a valid secular purpose, it turned on whether monitoring the program in order to ensure that the aid was only applied for that purpose would produce an excessive entanglement. *Id.* at 221.

⁴⁶ See *id.* at 234.

⁴⁷ *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 414 (2d Cir. 2001) (quoting *The American Heritage Dictionary*).

⁴⁸ *Id.* at 415 (“To hold otherwise would be to render superfluous the word ‘governmental’ in this central and presumably carefully worded *Lemon-Agostini* factor.”).

⁴⁹ See *Agostini*, 521 U.S. at 219 (citing *Meek v. Pittenger*, 421 U.S. 349, 372

employees in a sectarian environment created a symbolic union between religion and government.⁵⁰ Justice O'Connor found that those cases were no longer good law.⁵¹ The Court will not presume that "public employees will inculcate religion simply because they happen to be in a sectarian environment."⁵² Likewise, there is no longer a presumption that simply placing a public employee in a sectarian environment results in "a symbolic union between government and religion."⁵³ The Court went on to say that the once held view that symbolic union prevents any and all forms of government aid to religious institutions for secular purposes has been expressly rejected.⁵⁴

Since there is no presumption that symbolic union results in governmental indoctrination, the analysis turns on whether governmental aid subsidized the recipient's religious mission.⁵⁵ Reading *Agostini* and *Mitchell*⁵⁶ together, it is possible to discern some general principles helpful for navigating these areas. First, if a religious institution is "pervasively sectarian,"⁵⁷ government funds should not reach their coffers⁵⁸ since, at least

(1975) (overruled in part by *Mitchell v. Helms*, 530 U.S. 793 (2000) (discussing how the presences of teachers could instill certain religious beliefs)), *Wolman v. Walter*, 433 U.S. 229, 248 (1977) (overruled in part by *Mitchell v. Helms*, 530 U.S. 793 (2000) (holding that therapeutic and remedial services on non-school property does not impermissible effect freedom of religion).

⁵⁰ See *Agostini*, 521 U.S. at 220 (citing *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)).

⁵¹ See *id.* at 222 (holding that recent cases have altered the assumptions on which the prior cases relied upon).

⁵² *Id.* at 234.

⁵³ *Id.* at 223 (citing *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993)).

⁵⁴ *Agostini*, 521 U.S. at 225 (citing *Witters v. Washington Dept. of Servs. For Blind*, 474 U.S. 481 (1986) ("[W]e have departed from the rule relied on . . . that all government aid that directly assists the educational function of religious schools is invalid.")).

⁵⁵ See *id.* at 227 (rejecting the assumption that Title I teachers in parochial school would create a symbolic union).

⁵⁶ 530 U.S. 793 (2000).

⁵⁷ This term of art is discussed more fully below.

⁵⁸ See *Mitchell*, 530 U.S. at 839 (O'Connor, J., concurring) (noting that a central principle in cases where aid was upheld to pervasively sectarian institutions was that "no government funds reached religious school's coffers." (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 10 (1993)). The aid in question was either providing instructors or materials); *Agostini*, 521 U.S. at 228–29.

While it is true that individual students may not directly apply for Title I services, it does not follow from this premise that those services are distributed "directly to the religious schools." (citation omitted). In fact, they are not. No Title I funds ever reach the

for the purposes of direct aid, it is presumptively impossible to separate a pervasively sectarian institution from its religious mission. If an institution is considered pervasively sectarian, the government might be able to provide aid if the aid is in the form of a non-cash grant (for example, secular textbooks or computers).⁵⁹ In a case where a plaintiff wants to challenge a non-cash grant to a pervasively sectarian organization, “plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes.”⁶⁰ In other words, the Court will not presume that the institution will use the non-cash grant to directly promote their religious mission⁶¹ nor will it presume that the non-cash grant would free up institution funds making it possible to spend more on promoting its religious

coffers of religious schools . . . Title I funds are instead distributed to a public agency . . . that dispenses services directly to . . . eligible students.

Id.

The view that government funds should never reach the coffers of pervasively sectarian institutions can be considered the majority view of the Court at this time since all the dissenters in *Mitchell* would certainly join Justices O'Connor and Breyer on this narrow issue.

⁵⁹ See *Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring) (“Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history or literature, are used by the parochial schools to teach religion.” (quoting Bd. of Educ. of Central Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 248 (1968))). Also noting that the Court’s approval of aid to these pervasively sectarian institutions rested in part on the fact that the aid was not of the nature of materials or instructors that could presumably be used to advance a secular purpose. Direct funding is different). This can be considered the Court’s prevailing view since the plurality in *Mitchell* would join Justice O'Connor on this point. Given the doctrine underlying aid to pervasively sectarian institutions this is a controversial proposition. The only way to reconcile it with the courts jurisprudence in this area is to conclude that a neutrally distributed non-cash grant is less likely to be used for inculcation than direct funding would be.

⁶⁰ *Id.* at 857 (Justice O'Connor preferred this test to the plurality approach. As discussed above, given the political realities of the Court her narrower view is essentially the majority view until Court composition changes).

⁶¹ See *id.* at 859.

When a religious school receives textbooks or instructional materials and equipment lent with secular restrictions, the school’s teachers need not refrain from teaching religion altogether. Rather, the instructors need only ensure that any such religious teaching is done without the instructional aids provided by the government. We have always been willing to assume that religious school instructors can abide by such restrictions when the aid consists of textbooks . . . The same assumption should extend to instructional materials and equipment.

Id.

mission.⁶² Finally, if aid is dispersed to individual citizens to use in the form of a voucher, for example, they probably can apply it to secular services provided by a pervasively sectarian institution since no one can seriously maintain that governmental indoctrination occurs when an individual makes the choice of where it is spent.⁶³

In light of these guidelines, it seems clear that whether an institution is pervasively sectarian or not is key to any governmental indoctrination analysis.⁶⁴ The cases indicate that parochial schools are usually pervasively sectarian⁶⁵ but, otherwise, the term is not clearly defined.⁶⁶ Aid necessarily advances religion if it reaches an organization "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."⁶⁷ A pervasively sectarian institution should not receive direct government aid because,

⁶² See *Agostini*, 521 U.S. at 229 (stating that the Court is "unwilling to presume that the Board would violate Title I" by continuing to give aid to parochial schools who accepted aid for remedial instruction and reduced the level of the parochial school's funds expended for remedial instruction. If a school acted in such a way they would likely be freeing up funds that could be used to further their religious mission). The Court, however, will presume that a pervasively sectarian institution is incapable of separating direct aid from its religious mission. *Id.* at 220-21.

⁶³ See *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring) (noting that aid of this type can't reasonably be interpreted as government endorsement of religion).

⁶⁴ See *Bowen v. Kendrick*, 487 U.S. 589, 620-21 (1988) (remanding the case for lower court determination whether the affected institution were pervasively sectarian); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 109 Cal. Rptr. 2d 176, 202 (Cal. App. 4th 2001) (analyzing whether an institution was pervasively sectarian in order to determine whether a law violated the Establishment Clause). But see *Mitchell*, 530 U.S. at 827 (Thomas, J.) (noting that whether a recipient is pervasively sectarian or not should not be part of the analysis. "[T]he religious nature of the recipient should not matter . . . so long as the recipient adequately furthers the government's secular purpose.").

⁶⁵ See *Bowen*, 487 U.S. at 610-11 (distinguishing religiously affiliated organizations that provided counseling services for adolescents from religiously affiliated parochial schools); *Id.* at 631 (Blackmun, J., dissenting).

The majority first skews the Establishment Clause analysis by adopting a cramped view of what constitutes a pervasively sectarian institution. Perhaps because most of the Court's decisions in this area have come in the context of aid to parochial schools, which traditionally have been characterized as pervasively sectarian, the majority seems to equate the characterization with the institution.

Id.

⁶⁶ *Id.* at 631 (Blackmun, J., dissenting) ("Pervasively sectarian' [is] a vaguely defined term of art").

⁶⁷ *Id.* at 610 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

even if it is designated for secular purposes, it may be used to advance the religious mission and result in governmental indoctrination.⁶⁸ It appears that the Court will not presume that a religiously affiliated organization is pervasively sectarian⁶⁹ unless it is a parochial school.⁷⁰ It may seem curious that government funds can't be given directly to student X's parochial school but they can be given directly to student X's religiously affiliated counselors.⁷¹ Perhaps the distinction lies in the notion that parochial schools have traditionally been fertile grounds for inculcation.⁷² Since counseling services are not traditionally considered fertile grounds for inculcation,⁷³ the Court is not willing to presume there is an inextricable tie between the services and the religious institution's mission until it is proved otherwise.⁷⁴

⁶⁸ *Id.* (Rehnquist, J.) ("The reason for this is that there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institutions' religious mission.").

⁶⁹ *See Bowen*, 487 U.S. at 621 (on remand Plaintiffs needed to show that the religiously affiliated counseling providers were pervasively sectarian "such as we have held parochial schools to be." This was to be considered on a case by case basis since the statute was not unconstitutional on its face); *see also id.* at 623 (O'Connor, J., concurring) (noting that on remand, "extensive violations – if they can be proved in this case – will be highly relevant in shaping an appropriate remedy that ends such abuses.").

⁷⁰ *See Bowen*, 487 U.S. at 610–11 (noting that the cases hold that parochial schools are pervasively sectarian. Then noting that a religiously affiliated provider of counseling services for adolescents are not parochial schools so they are not necessarily pervasively sectarian).

⁷¹ *Id.* This inference is drawn from the fact that in *Bowen* the Court noted parochial schools are pervasively sectarian but held that religiously affiliated adolescent counseling services were not necessarily pervasively sectarian. *Id.*

⁷² *See id.* at 610–11 (noting Congress can't pass a law that, on its face, directly benefits only, or almost exclusively, parochial schools since aid to those schools would have the impermissible effect of advancing religion by aiding the institution religious mission which includes inculcation); *see also DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 414 (2d Cir. 2001) ("To 'inculcate' is '[t]o impress [something] upon the mind of another by frequent instruction or repetition; to instill.'" (quoting *American Heritage Dictionary*)).

⁷³ Certainly, any forum can become one for inculcation. However, it is usually fair to say that these types of counseling services aren't provided to expand an institution's religious base; they are provided to help individuals in need.

⁷⁴ *See Bowen*, 487 U.S. at 612 ("[N]othing in our prior cases warrants the presumption . . . that religiously affiliated . . . grantees are not capable of carrying out their functions . . . in a lawful, secular manner.").

B. Neutrality

Neutrality is an essential element of the second prong of the *Lemon-Agostini* impermissible effect test,⁷⁵ which asks whether recipients are defined by reference to religion. It has long been recognized that the government needs to remain neutral towards religion.⁷⁶ The government may not set up a church⁷⁷ nor may it aid or impede religious exercise.⁷⁸ Neutrality, however, does not prohibit a government from providing religious institutions with police and fire protection, textbooks, and other non-sectarian aid⁷⁹ as long as that aid is dispersed in an evenhanded fashion.⁸⁰ When an aid program is open to sectarian and non-sectarian recipients, like a law that provides benefits to all students, it is more likely to be considered neutral⁸¹ but this does not end the Constitutional analysis.⁸²

⁷⁵ See *Mitchell v. Helms*, 530 U.S. 793, 838–39 (2000) (O'Connor, J., concurring) (noting that neutrality is important but only part of the analysis).

[I]n *Agostini*, neutrality was only one of several factors we considered . . . Indeed given that the aid in *Agostini* had secular content and was distributed on the basis of wholly neutral criteria, our consideration of additional factors demonstrates that the plurality's rule does not describe our recent Establishment Clause jurisprudence.

Id. at 839.

⁷⁶ See *id.* at 874 (Souter, J., dissenting). Note that in her concurring opinion in *Mitchell*, Justice O'Connor specifically adopted Justice Souter's interpretation of the issue of neutrality in the Court's Establishment Clause jurisprudence. *Id.* at 839 (O'Connor, J., concurring). Accordingly, Justice Souter's view is the majority view.

⁷⁷ *Id.* at 873–74 (Souter, J., dissenting).

⁷⁸ *Id.* at 877 ("Government must maintain neutrality as to religion, 'neutrality' being a conclusory label for the required position of government as neither aiding religion nor impeding religious exercise by believers.").

⁷⁹ *Id.* at 879–80 (noting that court developed a "distinction between 'religious' and 'secular' benefits." The Court recognized that religious institutions were entitled to police and fire department protection because this aid only incidentally advanced religion if at all). *Id.* Then the Courts began to recognize grants of instructional aids like secular text books or translators were acceptably neutral aid.

⁸⁰ *Id.* at 882–83 (noting that once the secular and religious benefit distinction came to being the Court added further meaning to neutrality in this area by requiring allocation of aid on an evenhanded basis to religious and secular recipients).

⁸¹ See *id.* at 882 (noting that "the Court adopted the redefinition of neutrality as evenhandedness" (citing *Mueller v. Allen*, 463 U.S. 380 (1983))).

⁸² *Id.* at 839 (O'Connor, J., concurring) ("[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral it employs as a basis for distributing aid."); *id.* at 876 (Souter, J., dissenting).

Evenhandedness of distribution as between religious and secular beneficiaries is a relevant factor, but not a sufficiency test of

In order to satisfy the second prong, a funding program that defines its recipients by religion is unconstitutional on its face.⁸³ Funds must be distributed using “wholly neutral and secular criteria. . . .”⁸⁴ What logically follows is that once a religiously affiliated organization accepts government funding for a social welfare program, it cannot limit enrollment to members of its religion.⁸⁵ If it were to do so, the funding provision, while not unconstitutional on its face, would have the unconstitutional effect of promoting indoctrination into a particular religion. However, an institution that does limit enrollment to members of its religion may still be eligible to participate in a voucher, or true choice aid program.⁸⁶

constitutionality. There is no rule of religious equal protection to the effect that any expenditure for the benefit of religious school students is necessarily constitutional so long as public school pupils are favored on ostensibly identical terms.

Id. at 877. *But see id.* at 809 (Thomas, J., for the plurality):

If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any recipient conducts has been done at the behest of the government . . . if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further the purpose . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.

Id. at 809–10.

⁸³ *See id.* at 846 (O'Connor, J., concurring) (noting that a statute may not disburse funding be reference to religion because this would promote indoctrination into the religion eligible for the aid).

⁸⁴ *Id.*

⁸⁵ The Justices refer to this type of funding as a per-capita aid program as opposed to a true private choice aid program. *See id.* at 842–43 (O'Connor, J., concurring). Justice O'Connor felt that the distinction was important because if an institution were pervasively sectarian, government funds should not reach its coffers although it may be eligible for true private choice aid programs. *Id.* at 843. This distinction is important for endorsement reasons. *Id.* at 842–43. Therefore, if an organization accepts a direct grant, clearly it can't limit enrollment to members of its religion because that would create an incentive to undergo indoctrination that was created by government funding. However, if an individual were exercising a true private choice, presumably no indoctrination or endorsement issue would arise.

⁸⁶ *See id.* When government funding is provided directly to religious schools, “it is reasonable to say that the government has communicated a message of endorsement if the school uses those funds to inculcate religion in its students. . . .” *Id.* at 843. On the other hand, under a “true private-choice program,” the government funds support religious school only to the extent of “independent decisions made by numerous individuals” to attend such a school — therefore there are no endorsement implications for the government. *Id.* at 842–43.

C. *Excessive Entanglement*

A funding program fails the third prong of the *Lemon-Agostini* test if it results in an excessive entanglement with religion.⁸⁷ This does not mean any entanglement raises constitutional issues because “[i]nteraction between church and state is inevitable.”⁸⁸ The Court has drastically relaxed this standard in modern Establishment Clause jurisprudence. While it once considered whether a funding program would result in political divisiveness, or require cooperation between government entities and sectarian institutions, these factors are no longer dispositive.⁸⁹ Now the most significant part of the analysis is whether the program requires or results in “pervasive monitoring by public authorities.”⁹⁰ Since the Court will no longer presume that religiously affiliated organizations will not use government funds to lawfully further the government’s secular objectives,⁹¹ this requirement has been stripped of much of its force.⁹² In *Bowen v. Kendrick*,⁹³ the Court held that there was no excessive entanglement when the funding provision

⁸⁷ See *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (noting that excessive entanglement has always be considered because government intrusion has the impermissible effect of inhibiting religion).

⁸⁸ *Id.*

⁸⁹ Previously, the Court considered three areas in an excessive entanglement analysis:

(i)[Whether] the program would require “pervasive monitoring by public authorities” to ensure that Title I employees did not inculcate religion; (ii) [Whether] the program required “administrative cooperation” between the Board and parochial schools; and (iii) [whether] the program might increase the dangers of “political divisiveness” (citation omitted). Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an “excessive” entanglement.

Id. 233–34.

⁹⁰ *Id.* at 233.

⁹¹ See *id.* at 234 (“[W]e have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully.”); *Bowen v. Kendrick*, 487 U.S. 589, 612 (1988) (“[N]othing in our prior cases warrants the presumption . . . that religiously affiliated . . . grantees are not capable of carrying out their functions under the [funding program] in a lawful, secular manner.”).

⁹² See *Agostini*, 521 at 234 (noting that the assumption underlying the former pervasive monitoring analysis has been “undermined Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must discard the assumption that *pervasive* monitoring . . . is required.”).

⁹³ 487 U.S. 589 (1988).

allowed the implementing agency to review the recipient's program and materials as well as conduct periodic visits.⁹⁴ The Court has also upheld the constitutionality of audits of religiously affiliated recipients to ensure that grants are not being used to further the institution's religious mission.⁹⁵

This prong provides no great barriers to drafting appropriate legislation. Legislators can essentially treat a religiously affiliated funding recipient much as they would any other grantee for the purposes of monitoring without creating an excessive entanglement on the face of the provision. However, it is not hard to imagine excessive entanglements arising in practice. An excessive entanglement could arise from prolonged litigation brought by, or on behalf of,⁹⁶ the government against a religious organization.⁹⁷ Litigation may arise over disputes regarding whether religious recipients should be subject to conditions placed upon funding which happen to clash with a particular institution's religious beliefs.⁹⁸ While the issue is

⁹⁴ See *id.* at 616–17.

Unquestionably, the Secretary will review the programs set up and run by the . . . grantees, and undoubtedly this will involve a review of, for example, the educational materials that a grantee proposes to use. The Secretary may also wish to have Government employees visit the clinics or offices where . . . programs are being carried out to see whether they are in fact being administered in accordance with statutory and constitutional requirements. But in our view, this type of grant monitoring does not amount to "excessive entanglement."

Id. See also *Agostini*, 521 U.S. at 234 ("[W]e have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here.").

⁹⁵ See *Agostini*, 521 U.S. at 233 (citing *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 764–765 (1976) for the proposition that there is "no excessive entanglement where State conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion.").

⁹⁶ If a private citizen were to take advantage of a private right of action contained within a Federal Statute and act as a private attorney general for instance.

⁹⁷ See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 109 Cal. Rptr. 2d 176, 204–05 (citing *E.E.O.C. v. Catholic Univ. of America*, 83 F.3d 455, 465 (D.C. Cir. 1996) ("[C]ourts have found an unconstitutional entanglement with religion in situations where a 'protracted legal process pit[s] church and states as adversaries,' . . . and where the Government is placed in a position among 'competing religious visions.'").

⁹⁸ See generally Frank Bruni and Elizabeth Becker, *Charity Is Told It Must Abide By Antidiscrimination Laws*, N.Y. TIMES, July 11, 2001, at A15 (reporting that the Salvation Army asked that charitable institutions be exempt from law that bar hiring discrimination against homosexuals but their request was denied).

beyond the scope of this article, it would seem that any institution that could not square its secular organizations with discrimination laws would be considered pervasively sectarian and thus ineligible for direct funding,⁹⁹ but not other forms of aid.

II. CURRENT APPLICATION OF *LEMON-AGOSTINI* IN THE SECOND CIRCUIT

DeStefano v. Emergency Housing Group, Inc.,¹⁰⁰ a case coming out of the Second Circuit in the wake of *Mitchell*, is an excellent example of an up to date application of the *Lemon-Agostini* test. DeStefano challenged state funding of an alcohol treatment facility on the grounds that it included Alcoholics Anonymous (A.A.) in its treatment program.¹⁰¹ The treatment facility was almost entirely funded by the State¹⁰² but, it is important to note for our analysis, the facility was completely separate from A.A., which received no funds.¹⁰³ The court found that despite the fact that membership in A.A. is not conditioned upon any religious background or accepting any religion,¹⁰⁴ and the organization expressly rejects any ties to any religious

⁹⁹ See *Agostini*, 521 U.S. at 232 (“[T]o assess entanglement, we have looked to ‘the character and purposes of the institutions that are benefited’”). This article asserts that that statement sounds, at least in part, similar to a pervasively sectarian analysis. In *Bowen*, the court noted that some institutions cannot separate their religious mission from their secular mission. *Bowen*, 487 U.S. at 610. This would seem to be the case where because of religious beliefs an institution could not abide by Spending Clause conditions when carrying out secular programs. However, the Court will not presume a religiously affiliated institution is incapable of separating its religious mission from its secular one as far as might be necessary for compliance. “[N]othing in our prior cases warrants the presumption . . . that religiously affiliated grantees are not capable of carrying out their functions . . . in a lawful, secular manner.” *Id.* at 612. While this makes it easier for lawmakers to funnel funds to religiously affiliated organizations, it also seems to invite lawsuits from individuals who want particular organizations labeled pervasively sectarian.

¹⁰⁰ 247 F.3d 397 (2d. Cir. 2001).

¹⁰¹ *Id.* at 402 (outlining the facilities program, which included counseling, educational films, assessments, “rap groups,” and strongly suggests participation in A.A.).

¹⁰² *Id.* at 403 (noting that the facility received 95% of its funding from N.Y. State).

¹⁰³ *Id.* at 416 (“A.A. itself does not receive State funding either directly . . . or derivatively”).

¹⁰⁴ See *id.* at 423 (“A.A.’s potential members are not humankind in general, but a particular group of afflicted persons who are dispersed, both geographically and socially.”).

organization,¹⁰⁵ precedent required a finding that the A.A. program was a religious activity because members engaged in a group prayer at the end of meetings, and A.A. literature contained many references to God and spiritual practices.¹⁰⁶ Therefore, the court had to interpret Establishment Clause jurisprudence¹⁰⁷ and determine what the appropriate role was for an arguably religious approach to a secular problem¹⁰⁸ when direct government funding is involved.¹⁰⁹

The court found that the State's attempt to fight alcohol abuse was a valid secular purpose.¹¹⁰ It then rejected Plaintiff's argument that the mere appearance of union between the state funded facility and a religious organization amounted to endorsement, recognizing that the Court's approach to this area has changed.¹¹¹ The court went on to apply the *Lemon-Agostini* effect test:¹¹² It took the second prong first, finding that the funding program did not define "recipients by reference to religion" since there was nothing to indicate the State favored facilities that incorporated A.A.¹¹³ It then noted that the program passed the third prong of the test¹¹⁴ since the State only needed to engage in limited oversight to ensure funds were spent correctly.¹¹⁵

¹⁰⁵ See *id.* at 417 ("That A.A. is not a traditional form of religious worship and seems to encompass a wide range of monotheistic beliefs does not effect the calculus.").

¹⁰⁶ See *id.* at 406 (noting the court's previous decision to this effect in *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068 (2d Cir. 1997)).

¹⁰⁷ *Id.* at 408 ("Our conclusions that the A.A. program is religious activity under our case law . . . require us to assess the merits of DeStefano's assertions under the First Amendment.").

¹⁰⁸ See *id.* at 413 ("There can be little doubt that New York State is spending money principally to fight alcohol abuse, not to promote religion.").

¹⁰⁹ See *id.* at 419 (noting that the program involved "direct public funding" and that was an important distinction).

¹¹⁰ *Id.* at 413 (recognizing that the parties did not dispute this).

¹¹¹ See *id.* at 411 ("We read these decisions as casting doubt on the vitality of the endorsement test as a stand-alone measure of constitutionality in most Establishment Clause cases." The court noted that it would still be dispositive where a governmental entity "embraces a religious symbol").

¹¹² *Id.* at 413.

¹¹³ *Id.* at 414.

¹¹⁴ *Id.* ("Nothing in the record before us suggests that [the State] distributes state funds in a discriminatory manner favoring religious approaches in general or A.A. in particular.").

¹¹⁵ See *id.* at 414 ("[T]he State must keep an eye on the activities that are supported by the funding. This alone is not necessarily excessive entanglement."). The court also noted this program required very limited oversight and was well

The Second Circuit went on to address governmental indoctrination and noted that it is not enough that some indoctrination have had occurred; rather, the alleged indoctrination must be attributable to the government.¹¹⁶ The court held that it was appropriate to allow A.A. members to hold regular A.A. meetings in the facility's day room that patients could attend,¹¹⁷ but the court noted the facility could not require patients to attend these meetings as a condition to remaining at the facility.¹¹⁸ A.A. literature and videos could be made available to patients in a facility library¹¹⁹ but patients could not be required to read literature or watch the videos.¹²⁰ The court noted that on these points the voluntary nature of the activities was the "fulcrum" of the inquiry,¹²¹ and since A.A. received no State funding, their representatives could essentially do and say what they liked.¹²² Since staff members were paid almost entirely with State funds, the issue of their activities was more troublesome.¹²³ The court found that staff members could urge patients to attend A.A. meetings, even properly engage in

within Supreme Court parameters. *Id.*

¹¹⁶ *Id.* at 414 (citing *Agostini* for the proposition that even if indoctrination occurs it must be "attributable to the government" in order to be unconstitutional).

¹¹⁷ *Id.* at 408 (holding that "employment of a treatment approach in which independently led A.A. meetings play a substantial role" does not offend the Establishment Clause when facility was directly funded by the government).

¹¹⁸ *See id.* at 413 (noting that if the facility forced patients to attend the meetings there would be a constitutional problem, however, Plaintiff had previously withdrawn all allegations of coercion).

¹¹⁹ *Id.* at 408 (holding that the facilities practice of making A.A. literature and videos available to patients was appropriate).

¹²⁰ *See id.* (holding that staff couldn't require patients to watch A.A. related videos).

¹²¹ *Id.* at 412 ("The fulcrum of this inquiry, we think, is individual conscience and free will.").

¹²² *See id.* at 416. Since A.A. had no financial ties to the government, even if patients accepted the suggested A.A. recovery program, this indoctrination could not reasonably be attributed to the government since their decision to attend A.A. was voluntary.

¹²³ *See id.* at 416 ("Direct state funding of persons who actively inculcate religious beliefs crosses the vague but palpable line between permissible and impermissible government action."). The Second Circuit explicitly rejected the *Mitchell* plurality's view that neutral administration of a funding program was all the constitution required and adopted Justice O'Connor's position. *Id.* at 419. In other words, if a organization receives direct funds and then engages in inculcation, that indoctrination could reasonably be attributed to the government. If the aid weren't direct, as in the case of vouchers or non-cash grants, the aid is less likely to be reasonably perceived as governmental indoctrination.

persuasion and providing other encouragement.¹²⁴ The staff could not, however, read to patients from the A.A. literature nor could they supervise A.A. meetings.¹²⁵ The *DeStefano* court also recognized that the issue might have turned out differently if the patient had engaged in a true private choice and selected, possibly by submitting a voucher or using Medicaid benefits, a facility that incorporated mandatory A.A. over one that did not.¹²⁶ However, the facility in *DeStefano* was directly funded and that was essential to the analysis.¹²⁷

III. EXPANSION OF CHARITABLE CHOICE AND THE CARE ACT ARE PERMISSIBLE

In light of the above analysis of current Establishment Clause jurisprudence, it should be clear that a government funding provision, if drafted properly, will not offend the Establishment Clause for providing aid to religiously affiliated organizations that further a legitimate secular purpose. Both Expansion of Charitable Choice¹²⁸ and the CARE Act¹²⁹ (the Acts) pass constitutional muster.

The purpose of the Acts is “to enable assistance to be provided to individuals and families in need in the most effective

¹²⁴ See *id.* at 410. The court went on to explain that:

[U]rging people to attend or explaining to them why, in the view of the speaker, it is in their best interests to attend A.A. sessions is not, without more, indoctrination. It does not imbue clients with A.A.’s point of view, nor does it inculcate or “impress [A.A. beliefs] upon the mind of the listener by frequent instruction or repetition.”

Id. at 415.

¹²⁵ *Id.* at 408 (holding that staff could not properly engage in nightly readings of A.A. literature nor could it supervise A.A. meetings). Since the staff is essentially directly paid for by the government, these activities could reasonably be construed as government indoctrination.

¹²⁶ See *id.* at 413. In this case, a patient had no state sponsored alternative to the care provided in the facility. If the patient had had a choice between a facility that required attendance at A.A. meetings and one that did not, the facility might be allowed to condition admission to the facility upon said attendance. There would be free choice, but the choice between treatment and no treatment is no choice at all. *Id.*

¹²⁷ See *id.* at 416 (comparing *DeStefano* to the Court’s decision in *Agostini* where the State’s funding did not result in governmental indoctrination); see also *supra* note 117.

¹²⁸ Community Solutions Act of 2001, H.R. 7, 107th Cong. (2001).

¹²⁹ Charity Aid, Recovery and Empowerment Act of 2002, S. 1924, 107th Cong. (2002).

and efficient manner.”¹³⁰ The Acts further define their secular purposes by listing specific types of programs to be addressed:¹³¹ juvenile delinquency, aid to children who have a parent in prison, housing assistance, and hunger relief are just a few areas listed.¹³² In order to ensure that the program does not result in governmental indoctrination, the House version provides that “[n]o funds provided through a grant or cooperative agreement to a religious organization . . . shall be expended for sectarian instruction, worship, or proselytization. If the religious organization offers such an activity it shall be voluntary for the individuals receiving services”¹³³ Since there is no presumption that religiously affiliated organizations will ignore the statutory mandate, there is no reason to presume governmental indoctrination will occur.¹³⁴

On the second prong of the test, it becomes important to note that Charitable Choice has never defined its recipients by reference to religion;¹³⁵ it merely allows religious institutions to compete for government funds “on the same basis as other nongovernmental organizations.”¹³⁶ Expansion of Charitable Choice also requires that grantees, whether receiving direct or indirect aid (i.e., vouchers), cannot require recipients of their services be of, or join, their religion.¹³⁷ This provision *may* go beyond constitutional protections required by current Establishment Clause jurisprudence. It would certainly work to

¹³⁰ Community Solutions Act of 2001, H.R. 7, 107th Cong. at § 1991(b)(1).

¹³¹ Community Solutions Act of 2001, H.R. 7, 107th Cong. at § 1991(c)(4) (defining “PROGRAMS- For the purposes of this section”); CARE Act of 2002 S. 1924 107th Cong. (noting that purpose is “[t]o promote charitable giving and other purposes”).

¹³² Community Solutions Act of 2001, H.R. 7, 107th Cong. at § 1991(c)(4) (listing multiple types of aid that will be considered a program under section 1991); CARE Act of 2002 S. 1924 107th Cong. at § 301(e)(2)(A)(ii) (listing the same).

¹³³ Community Solutions Act of 2001, H.R. 7, 107th Cong. at § 1991(j). The Senate version does not include this limitation but it is implicit since this is merely a restatement of the Court’s position on this point.

¹³⁴ See *Bowen v. Kendrick*, 487 U.S. 589, 612 (1988) (“[N]othing in our prior cases warrants the presumption . . . that religiously affiliated . . . grantees are not capable of carrying out their functions . . . in a lawful secular manner.”).

¹³⁵ See 42 U.S.C. § 604a(c) (“[R]eligious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance.”).

¹³⁶ Community Solutions Act of 2001, H.R. 7, 107th Cong. at § 1991(c)(1)(A) (2001).

¹³⁷ *Id.* at § 1991(h)(2) (“A religious organization providing assistance [through direct or indirect aid program] . . . shall not deny an individual . . . admission on the basis of religion, a religious belief, or refusal to hold a religious belief.”)

safeguard against governmental aid having the unintended effect of providing an incentive to join a particular religion.¹³⁸

Under these Acts, religiously affiliated organizations shall be accountable in much the same manner that other nongovernmental recipients are.¹³⁹ The House version is very specific on this matter: recipients of direct aid can keep the aid in an account separate from the religious operations and only that account will be audited.¹⁴⁰ Recipients of indirect assistance may keep the aid in a separate account, and, if they do, only that account will be audited.¹⁴¹ Religiously affiliated recipients will also complete an annual self-audit to assess statutory compliance.¹⁴²

The CARE Act treats all nongovernmental social welfare providers the same and does not list specific auditing safeguards. This is constitutionally permissible. Since there is no presumption religiously affiliated providers will flout statutory mandates, there is no need to engage in pervasive monitoring of affiliated providers.¹⁴³ Therefore, both Acts provide for some modest oversight and, as a result, do not result in an excessive entanglement.

IV. THE BUSH ADMINISTRATION'S BROADER PROPOSALS ARE ALSO PERMISSIBLE

President Bush championed Expansion of Charitable Choice because the original provision applied to "only a small portion of

¹³⁸ See *supra* note 86 and accompanying text. Under Justice O'Connor's analysis in *Mitchell*, it appears that even if an organization requires participants to be of a specific religion it may be eligible to participate in true individual choice programs or receive non-cash grants. *Mitchell v. Helms*, 530 U.S. 793, 842 (2000) (O'Connor concurring). This would not stop Congress from conditioning participation upon non-discrimination.

¹³⁹ Community Solutions Act of 2001, H.R. 7, 107th Cong. at § 1991(i)(1) ("Except as provided . . . a religious organization providing assistance under any program . . . shall be subject to the same regulations as other nongovernmental organizations to account."); CARE Act of 2002, S. 1924 107th Cong. § 301(c)(2).

¹⁴⁰ Community Solutions Act of 2001 H.R. 7 107th Cong. § 1991(i)(2)(A).

¹⁴¹ *Id.* at § 1991(i)(2)(B).

¹⁴² *Id.* at § 1991(i)(2)(C).

¹⁴³ See *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (noting that since the presumption that merely placing a public employee in a sectarian environment results in governmental indoctrination had been abandoned so to must the presumption that a program placing public employees in a sectarian environment requires pervasive monitoring).

Federal social spending.”¹⁴⁴ In addition to pushing the bill through Congress, the Bush Administration promises to use the powers of the executive to “realign Federal policy and programs to better use, empower, and collaborate with . . . faith-based and other community serving groups that have traditionally been distant from our government.”¹⁴⁵ It will do so by identifying “Federal rules and practices” that act as barriers to aid for such groups and “propose regulatory and statutory relief” to remove them.¹⁴⁶ It will also encourage individual State executive branches to engage in the same process.¹⁴⁷

The Bush Administration also proposes to initiate “test partnerships between the Federal Government and faith-based and grassroots groups to serve particular needs.”¹⁴⁸ These particular needs include funding of “services reaching the children of prisoners,” like mentoring conducted by religiously affiliated groups, and a program that prepares inmates for reentry to society.¹⁴⁹ They also include funding of after school programs run by religiously affiliated groups and “maternity group homes,” although it doesn’t define exactly what type of services would be provided by the specific homes.¹⁵⁰

The President’s proposals do not threaten any more violence to the Establishment Clause than do the Charitable Choice provisions that came before him; he merely seeks to use the executive branch to make the legislation more effective. The only thing remotely troublesome about the Bush Administration’s policy is that it arguably indicates a preference for faith-based solutions.¹⁵¹ However, the Administration is careful to point out that they are singling out faith-based and community based organizations “not because of favoritism . . . but because they typically have been . . . excluded in Federal policy.”¹⁵² The Administration’s stated purpose is to ensure that social welfare programs work as effectively as possible and that

¹⁴⁴ *Rallying the Armies of Compassion*, *supra* note 2.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* One probably wouldn’t argue that these are noble pursuits.

¹⁵¹ See *id.* (noting, somewhat defensively, that it mentions “faith-based and other community-serving groups” by name not out of “favoritism”).

¹⁵² *Id.*

the best way to do this is encourage participation from organizations that have traditionally been discriminated against in public subsidy schemes.¹⁵³ While some may question the Bush Administration's motives,¹⁵⁴ one can't deny that their argument is a reasonable one and, on its face, it poses no constitutional issues.¹⁵⁵

V. POTENTIAL DANGERS THAT MAY ARISE IN APPLICATION OF THE FAITH-BASED INITIATIVES AND HOW THEY MIGHT BE ADDRESSED

While Expansion of Charitable Choice and the President's wider proposals are facially permissible, problems may arise in application. These problems are not threats to the government's social welfare programs; rather, they are threats to the religiously affiliated institutions that endeavor to become government funded social service providers. More safeguards should be given to these institutions.

Neither bill gives religiously affiliated providers an exemption from most statutory non-discrimination provisions.¹⁵⁶ This makes it more likely that religiously affiliated organizations could be sued under federal statutes, either by or on behalf of the government, which could amount to an excessive

¹⁵³ *Id.*

These quiet heroes lift people's lives in ways that are beyond government's know-how, usually on shoestring budgets, and they heal our nations ills one heart and one act of kindness at a time Private and charitable groups, including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes, like curbing crime, conquering addiction, strengthening families, and overcoming poverty Our aim is equal opportunity for such groups.

Id.

¹⁵⁴ See Newman, *supra* note 2 and accompanying text.

¹⁵⁵ See *Rallying the Armies of Compassion*, *supra* note 2. (the Administration does not endorse one religion nor even religious organizations in general since it promises to help "grassroots and other non profit groups" including "faith-based and community serving groups").

¹⁵⁶ See Community Solutions Act of 2001, H.R. 7, 107th Cong. at § 1991(f) ("Nothing in this section shall alter the duty of a religious organization receiving assistance or providing services . . . to comply with . . . non-discrimination provisions."). But see *id.* at § 1991(e) (providing that religious organizations exemption under 42 U.S.C. 2000e-1 is not effected). Religious organizations are still allowed to hire only members of its religion.

entanglement.¹⁵⁷ One solution to this problem would be to provide a broader exemption from non-discrimination provisions to religiously affiliated providers.¹⁵⁸ Perhaps a more politically acceptable solution would be to provide an administrative forum where any violation could be decided in an eligibility review.¹⁵⁹ If a violation could be found, future aid would be conditioned upon taking steps to end the discriminatory practice. If these administrative decisions were only subject to limited review, and the only remedy were a conditional end of funding, the threat of an excessive entanglement arising might be greatly reduced.

The religiously affiliated institutions also need clear answers on what is permissible and impermissible. The White House Office of Faith and Community Based Initiatives needs to give potential recipients clear guidelines explaining exactly what is expected of them, and these guidelines need to be reviewed by constitutional experts.¹⁶⁰

VI. FROM THE AFFILIATED ORGANIZATION'S PERSPECTIVE

Any institution considering whether to apply for a grant must first consider the implications. The experience of the Red Cross, which was severely criticized after September eleventh for its alleged failure to spend funds as promised, demonstrates that when a charity enters a field traditionally controlled by government, it will be analyzed under a microscope. A faith-based organization probably wants none of this scrutiny unless there is a very good reason for submitting to it.

A faith-based organization might decide that the only

¹⁵⁷ See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 109 Cal. Rptr. 2d 176, 204-05 (citing *E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 465 (D.C. Cir. 1996)). "[C]ourts have found an unconstitutional entanglement with religion in situations where a 'protracted legal process pits church and states as adversaries,' . . . and where the government is placed in a position of choosing among 'competing religious visions.'"

¹⁵⁸ See Bruni and Becker, *supra* note 97 (noting that religiously affiliated charities asked the house for a broader exemption).

¹⁵⁹ Whether the Government could limit this type of eligibility review to faith-based organizations is another issue beyond the scope of this article. It would seem that such a distinction could pass strict scrutiny since the Government has a compelling interest in avoiding Establishment Clause violations.

¹⁶⁰ In its current form, Expansion of Charitable Choice allows for some "training an technical assistance" for small nongovernmental organizations." Community Solutions Act of 2001, H.R. 7, 107th Cong. at § 1991(o).

legitimate reason for submitting to such scrutiny is if the organization can provide the welfare service more effectively than traditional providers because of its faith-based approach. If that is the case and a religiously affiliated institution could not apply their faith to the social evil they are asked to address because of Establishment Clause concerns, there would be no reason for the organization to accept government funding in the first place.

But even if the faith-based organization can provide the service within the confines of the Establishment Clause, every organization should do a benefit-burden analysis before accepting funds. When considering a direct grant, an institution must understand that the staff¹⁶¹ implementing the secular program cannot engage in indoctrination or inculcation.¹⁶² The staff may urge the client to volunteer to engage in indoctrination provided by the institution's church, and even give persuasive reasons why the client should attend indoctrination,¹⁶³ but simple activities like staff led prayer in such facilities would probably not be permissible.¹⁶⁴ Providing a religious library would be acceptable,¹⁶⁵ and it's likely that church volunteers could enter a facility to provide indoctrination but clients could not be required or coerced to participate.¹⁶⁶

¹⁶¹ It is not entirely clear whether voluntary staff are treated the same as paid staff. This article would suggest that a religiously affiliate institution would treat them as one in the same. However, if a volunteer is not carrying out staff activities they should not be part of the staff and thus could be treated differently.

¹⁶² See *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 416 (2d Cir. 2001) ("Direct state funding of persons who actively inculcate religious beliefs crosses the vague but palpable line between permissible and impermissible government action."); see also *supra* note 117 and accompanying text.

¹⁶³ See *DeStefano*, 247 F.3d at 415 ("Urging people to attend [indoctrination] or explaining to them why, in the view of the speaker, it is in their best interest to attend . . . is not, without more, indoctrination.").

¹⁶⁴ See *id.* at 408. The staff could not read to patients from what was arguably religious literature. *Id.* It follows that the staff would also be restricted from leading clients in prayer sessions. However, nothing suggests a true volunteer could not lead prayers as long as they were voluntary in nature.

¹⁶⁵ See *id.* at 421 (holding that facility could maintain a library of arguably religious materials and make them available to clients).

¹⁶⁶ In *DeStefano*, members of A.A. could enter the institution and hold meetings. *Id.* at 416. However, it may be possible to distinguish that case from the case of the treatment center run by a church since A.A. had no affiliation with the institution in *DeStefano*. However, the distinction doesn't seem important since the voluntary nature of the activities was the "fulcrum" of the analysis, not the lack of financial ties. *Id.* at 412.

When an institution decides to accept vouchers or other forms of indirect aid, it may be able to engage in more direct indoctrination but it must not define eligibility by reference to religion.¹⁶⁷ The institution should recognize that greater participation in this area could be accompanied by increased exposure to litigation. There is also a risk that religious organizations could become scapegoats when things go awry: If the public begins to expect social welfare services from religious institutions and they can't oblige because, for whatever reason, nobody ever gave them any real aid, who will be blamed? After weighing these considerations, each organization must assess whether they can provide real help in light of potential dilution of their message.

CONCLUSION

Expansion of Charitable Choice and the Bush Administration's wider proposals do not violate the Court's Establishment Clause jurisprudence. They may result in constitutional and practical problems in application but these could be greatly reduced if Congress provides religiously affiliated social service providers more statutory safeguards like greater exemptions from non-discrimination provisions or an administrative remedy to settle disputes that arise.

There is no doubt that faith-based approaches are often the most effective ways to address addiction, homelessness, teen pregnancy, and other social ills. The only doubt that arises is whether governmental and constitutional restrictions will allow faith-based recipients to bring that faith to bear on the social problem they are asked to address. The Court's modern Establishment Clause jurisprudence makes it clear that the Constitution does not prevent government funding of social welfare providers as long as the funds are not used to advance religion. Policy makers should recognize this as another arrow in their quiver and encourage funding where it is appropriate and advantageous to do so. Before accepting these funds, faith-based organizations should familiarize themselves with the law in this area and the attendant risks and determine whether they can still act effectively to address the social ill in question.

¹⁶⁷ See *supra* note 86 and accompanying text.